80-1686

No. ——

Office-Supreme Court, U.S.
FILED
APR 7 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, et al.,
(Adams Extract Co., et al.
real parties in interest),
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FLETCHER H. ETHERIDGE
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3219

HAROLD F. BAKER
ALAN WISEMAN
ROBERT F. RUYAK
ROBERT L. GREEN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Counsel of Record for Petitioner

Dated: April 7, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

APPENDIX TABLE OF CONTENTS

		Page
1.	Order, United States Court of Appeals for the Fifth Circuit, filed February 18, 1981	1a
2.	Order, United States Court of Appeals for the Fifth Circuit, filed March 13, 1981	2a
3.	Order, United States Court of Appeals for the Fifth Circuit, filed March 25, 1981	3a
4.	Pretrial Order No. 60, U.S. District Court for the Southern District of Texas, filed December 3, 1980	4a
5.	Pretrial Order No. 61, U.S. District Court for the Southern District of Texas, filed January 9, 1981..	10a
6.	Pretrial Order No. 62, U.S. District Court for the Southern District of Texas, filed January 27, 1981..	18a
7.	Pretrial Hearing, May 16, 1980, Volume I	28a
8.	Pretrial Order No. 51, U.S. District Court for the Southern District of Texas, filed May 23, 1980	29a
9.	Transcript of Proceedings, Volume I, June 9, 1980 (Morning Session)	32a
10.	Transcript of Proceedings, July 22, 1980, Volume 49 (Morning Session)	36a
11.	Transcript of Proceedings, July 22, 1980, Volume 50 (Afternoon Session)	37a
12.	Transcript of Proceedings, July 28, 1980, Volume 55 (Afternoon Session)	39a
13.	Letter of Harold F. Baker, Howrey & Simon, to The Honorable John V. Singleton, Jr., dated September 6, 1980	41a
14.	Transcript of Proceedings, September 8, 1980, Volume 94 (Afternoon Session)	44a
15.	Transcript of Proceedings, September 9, 1980, Volume 95 (Morning Session)	46a

APPENDIX TABLE OF CONTENTS—Continued

	Page
16. Transcript of Proceedings, September 9, 1980 Volume 96 (Afternoon Session)	47a
17. Transcript of Proceedings, September 11, 1980, Volume 100 (Morning Session)	48a
18. Special Verdict, U.S. District Court for the Southern District of Texas, dated September 13, 1980	49a
19. Transcript of Proceedings, September 13, 1980, Volume 102	56a
20. Notice of Master's Hearing, dated March 24, 1981	57a

ORDER—Filed February 18, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-2050

IN RE: THE MEAD CORPORATION,
Petitioner.

On Petition for Writ of Mandamus

Before GEE and RUBIN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that a response be filed to the Petition for Writ of Mandamus not later than March 9, 1981.

IT IS FURTHER ORDERED that further proceedings in the District Court are stayed pending further order of this Court.

ORDER—Filed March 13, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2050

IN RE: THE MEAD CORPORATION,
Petitioner.

On Petition for Writ of Mandamus

Before GEE, RUBIN and TATE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

ORDER—Filed March 25, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-2050

IN RE: THE MEAD CORPORATION,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court
for the Southern District of Texas

Before GEE, RUBIN and TATE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of the Court's order of 3-13-81 denying its petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310
(All Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER NO. 60

1. A hearing was held on December 1, 1980, to discuss methods of reducing the jury verdict in the class case to judgment. The court has studied the briefs and heard the arguments of the parties, and has reviewed the motions and rulings already made which have a bearing on this issue.

Initially, the court overrules Mead's objections to any proceedings other than judgment for it which are based on the reservation by the court of the final calculation of a dollar amonut of damages and the [corollary] absence of jury findings as to a dollar amount. It is true that before trial the three defendants then remaining in the case announced that they were considering filing a motion for separate trials of the liability and damages aspect of this case. Defendants' Proposed Final Pretrial Order of May 14, 1980, p. 5. At a conference on May 16, 1980, the court announced that it would not bifurcate damages from liability and in Pretrial Order No. 51 entered May 23, 1980, stated that defendants were deemed to have made a "motion to bifurcate the trial of liability and damages issues" and that the motion was overruled. This ruling was based on the substantial case law in this circuit which requires that impact or fact of injury be proven as part of liability, and the fact that the additional proof necessary to allow a jury to de-

termine a measure of damages, if any, would be more efficiently presented to the same jury than to a new one. It was, however, clear to the parties and to the court that plaintiffs' damages testimony would be framed in percentage figures. Their economic expert's report was filed April 1; his deposition was taken in mid-April. Plaintiffs attempted through April to get interrogatory answers from settling defendants as to their dollar volume of sales to class members. Settling defendants objected strenuously on the grounds that such requests were premature and burdensome and in Pretrial Order No. 48, entered April 23, the court sustained their objections except as to net sales by year. Until a conspiracy, the relevant time period and the relevant coconspirators were determined by the jury it seemed unnecessarily burdensome to require settling defendants to respond with such detailed information.

As the trial progressed, plaintiffs, at the court's urging, attempted to arrive at stipulations with the dwindling number of defendants as to the dollar sales of corrugated to class members. No stipulations were achieved.

As matters stood when the plaintiffs' case neared its close, the court could allow plaintiffs to submit only a percentage overcharge issue to the jury and separate out for later determination what dollar volume of sales would be multiplied by the percentage, if any, found by the jury—a task unlikely to present any contested issues of material fact; or it could require all defendants to pursue the expensive and burdensome task of unearthing the relevant data for the entire alleged conspiracy period, require plaintiffs to present that data as evidence, and require the jury to make the complicated arithmetical calculations necessary to reach a dollar figure. It should be stressed that the court considered it unlikely that plaintiffs would prevail on their allegations of fraudulent concealment to toll the statute of limitations: the court

had repeatedly stated that it was seriously considering granting summary judgment or directing a verdict on this issue, and the court's doubts as to plaintiffs' proof thereon were confirmed by the jury's verdict that fraudulent concealment was not shown by a preponderance of the evidence. Further, the plaintiffs' case was relatively weak against certain alleged coconspirators, and the legal question of whether a company found to be a member of the alleged conspiracy would be responsible for overcharges by non-conspirators had not been briefed or decided, the case law on this point being extremely unsettled. Additionally, the question of whether a conspirator had withdrawn was an open one for the jury's consideration. All these issues made the submission of dollar sales evidence and the calculation of a dollar damages amount so complicated and unwieldy as to overburden severely the jury's ability to arrive at an accurate dollar figure. The court therefore decided to separate out the calculations of a dollar figure for such proceedings as might most efficiently dispose of it, should the jury find the essential elements: fact of conspiracy, membership of remaining defendant Mead, fact of injury, and some percentage of overcharge resulting from the conspiracy. In fact, the court's concerns were fully justified. The jury found some of the alleged conspirators to be innocent, found one to have withdrawn, and found no fraudulent concealment to toll the statute of limitations.

The decision to separate this issue for later proceedings, should they become necessary, was known to the parties. The issue does not overlap those submitted to the jury and is not so intertwined with them as to render this decision unjust. It is an arithmetical calculation of a jury-determined percentage of overcharge multiplied by the relevant sales by corrugated manufacturers to class members. In the unlikely event that a contested fact issue is raised by the sales figures, which settling

defendants have not yet begun to produce, it can be dealt with by impaneling another jury.

Mead's argument that the trial was not bifurcated and therefore plaintiffs have failed to prove their case is simply groundless. Mead knew all along that the court was considering using only a percentage figure, as plaintiffs urged, if stipulations could not be achieved. Mead knew, at the close of the evidence, that no stipulations would be reached and that the court therefore was allowing submission of damages on a percentage basis. Mead's objection to this part of the jury instructions was made and overruled.

In sum, the court made, and the parties were well aware of, the decision to proceed on a percentage basis and reserve for later proceedings the questions of a final dollar amount.

It now becomes necessary to gather the data from which the necessary computations can be made. To guide the plaintiffs, Mead, and the settling defendants in accumulating their sales information, the court lays down the following basic rules:

(a) only the sales for the period March 7, 1973 through December 31, 1975 are in question;

(b) only sales to class members are relevant. That is intracorporate sales or sales to other defendants (settling or non-settling), to independent corrugated manufacturers, or to opt-out plaintiffs are not involved;

(c) international sales are not relevant;

(d) only the prices actually paid are relevant. If there were discounts or rebates involved, only the actual amount paid is relevant;

(e) if separate charges were assessed for services (e.g., a separate freight charge), such separate charges are not relevant.

Plaintiffs shall draft and submit to defendants (settling or non-settling) by December 2, 1980 a set of interrogatories designed to elicit the necessary information. Defendants' counsel shall confer with their clients to determine whether any problems exist in obtaining the required data. If a company has a problem, it shall file its objections by December 15, 1980 and shall appear at a conference on December 17, 1980, at 9:30 a.m. to assess the problems and ascertain the most effective means of arriving at a dollar figure for judgment. Any company with a problem shall be represented at the conference by a representative knowledgeable about its records and retrieval of data or by its attorney with immediate access by telephone to some such knowledgeable person.

The settling defendants have been involved in this litigation for a long time. They have assembled documents for a grand jury; many were involved in discovery in the criminal cases; all have been involved in extensive discovery and document production in this civil case. The information solicited here was requested, in somewhat different form, earlier this year. The records requested are not particularly ancient. When they settled with class plaintiffs, each defendant contracted to remain subject to this court's jurisdiction for discovery purposes; and when they objected to the prematurity and burdensomeness of the plantiffs' previous interrogatories all settling defendants understood that they would be required to answer detailed interrogatories in the event the jury found liability. Therefore, the oral objection of Stone Container, Weyerhaeuser, and McMillan Bloedel to the jurisdiction of the court to order such discovery is overruled. Defendants should keep records of their reasonable and necessary expenses incurred in this discovery.

2. Mead's motion to extend the filing date for its objections to plaintiffs' motion for proceedings preparatory to judgment is granted.

3. Pretrial Order No. 59 is amended to change the caption "MDL 310 (All Class Cases)" to "MDL 310 (All Opt-Out Cases)."

4. All class members who have filed late claims or motions to file late claims or motions to amend their claims as of December 1, 1980, are hereby granted leave so to file.

DONE this 3rd day of December, 1980 in Houston, Texas.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310
(All Class Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER 61

A conference was held before the court on December 17, 1980. The court has considered the motions, briefs, affidavits and arguments submitted on the various matters discussed at that conference and enters the following ORDER:

1. Plaintiffs' motion for judgment non obstante veredicto or for new trial on the issue of fraudulent concealment is DENIED.

2. Mead's motion to decertify the class is DENIED.

3. Plaintiffs' motion for judgment based on purchases of all defendants, including those found by the jury not to have been conspirators, is DENIED. The court is not ruling that class members who purchased from non-conspirators lack standing to sue, an issue which has not been presented. Plaintiffs' motion is denied because the findings of fact necessary to support such recovery were not made. Specifically, no findings were sought or made that non-conspirators' prices were excessive.

4. Mead's motion to vacate Pretrial Order No. 60 is DENIED. Mead has pointed out two allegedly erroneous statements of fact in Pretrial Order No. 60: (1) that the parties had been working on stipulations as to dollar sales of alleged coconspirators and (2) that Mead understood that there were any issues to be deferred until after verdict.

As to the first, the court in Pre Trial Order 60 stated that "plaintiffs, at the court's urging, attempted to arrive at stipulations with the dwindling number of defendants as to the dollar sales of corrugated to class members." In reviewing the record, the court finds the following colloquy on July 28, 1980, near the end of plaintiffs' case in chief:

> Mr. Baker (representing Mead): Well, the jury is entitled to know, I think—at least, this is my tentative position—what dollars you are talking about that 2.5 equals, because there's been a lot of talk here and there's a lot of market involved.
>
> The Court: Then you are going to have to get a stipulation in here about what the total sales were.
>
> Vol. 55, p. 194

The discussion continued as to the difficulty of getting the precise figures needed and Mr. Ruyak, representing Mead stated:

> We can stipulate perhaps to something like that on the estimate. We can't do it precisely each year, but there may be other ways to do it. We can put that aside right now, but that is the problem we face in getting to the damage issue in terms of dollars.
>
> Vol. 55, p. 202

Finally, after plaintiffs' counsel reurged the percentage figure submission eventually used, the discussion ended as follows:

> Mr. Arps (representing Westvaco): Our difficulty is, as Mr. Baker has pointed out here, that these are gross figures and, so far, we haven't been able to work out a method of segregating what's intra-company transactions and what were to competitors, sales to competitors.

The Court: I understood that from the very beginning.

Mr. Arps: That's right.

The Court: From the very beginning, I've been told that there are some companies that don't have that breakdown.

Mr. Arps: That's right. Maybe we can work out something. I don't know. We haven't tried to.

The Court: You'd better start working on it. That's all I'm telling you.

Vol. 55, pp. 206-208

According to Mr. Baker's affidavit, the attorneys did not in fact ever "start working on it." Plaintiffs apparently never made any effort to reach a stipulation. Of course, it was not the responsibility of defendants to do so. If there is any blame to be assessed in this regard, it lies at the plaintiffs' door. That does not, however, alter the court's decision to submit a percentage damage issue to the jury.

The second allegedly erroneous statement in Pretrial Order No. 60 is quite different. As stated in Mead's brief, it is that "[f]rom the inception of the trial, including the pretrial proceedings, the parties and the court clearly understood—and specifically stated—that the issue of damages was being tried simultaneously with the issue of liability. At no times during plaintiffs' case-in-chief or during the period Mead was presenting its defense did the court modify or change its no-bifurcation order or even suggest that damages would be separately tried to a second jury or to the court after the verdict of the jury in the box.[10]" The footnote is to a portion of Mr. Baker's affidavit not relating directly to the quoted material, but dealing with Mr. Baker's decision not to call one of Mead's expert witnesses.

The simple fact, which can hardly be other than clear to Mead's experienced trial attorneys, is that this case presented many procedural difficulties, many complex problems of proof, many legal issues as yet undecided in the substantive law of antitrust, and management problems unprecedented in this court or even in this circuit. It was, as Mead correctly states, the court's original intention that the jury be asked to find a dollar figure of damages if they found liability. The court was aware, however, from the time plaintiffs filed their proposed jury verdict sheet and jury instructions in April of 1980, that plaintiffs were contemplating a percentage submission. Mead must also have been aware of this if it read the plaintiffs' submission. It was clearly impossible to set in concrete before the trial began many decisions concerning order and manner of proof, admissibility and even availability of evidence, manner of submission to the jury, etc. To have attempted to do so could have resulted in serious injustice to the parties. The court made an effort to be flexible, to allow the parties to reurge their positions in the light of the developing case presentation, and to adjust prior rulings when necessary to avoid inconvenience, unclear presentation of evidence, unnecessary expense, or injustice. All parties received some benefits from those efforts by the court.

Turning now to Mead's specific complaint that it had no notice before verdict of the court's decision to separate out the computation of a dollar figure for determination if and only if the verdict was for plaintiffs, it is very difficult for the court to see how experienced counsel can have failed to understand the court's problem, its reasoning, and its ruling. Mead's brief quotes from the lengthy discussion of this question on July 28, just before plaintiffs rested. To quote, in pertinent part:

> The Court: What I am bothered with, Mr. Baker, is getting this case concluded in some way to get it submitted to the jury.

Now, there is one way to do it and that is to ask the jury ultimately what percentage do they find.

Another way to do it is to ask the jury to make the calculations based upon some "X" and break it down as I have suggested, and what I think I would do, and that is on a market share basis against these two defendants.

Now quite frankly, the simplest way to go about it from the jury's standpoint, is to ask them a percentage and then for us to fight out the remainder of it without the jury here.

Vol. 55, pp. 198-199

The Court: I don't know. I'm not—I'm not going to make any big final decision right now, but I am inclined to make this case to the jury as simple as possible under the evidence. And the simplest way to do it on this issue would be to ask them to find what the percentage is. That way, you have your model here, and you are going to have a model—I don't know what your model is. It might be zero. I don't know what it is. So that they'd have something to argue about on a percentage basis, which I think would be the simplest thing. And then if they were to find a conspiracy existed, if they were to find membership in the conspiracy, then we could all argue out the ultimate money without putting that to the jury.

Vol. 55, pp. 199-200

The Court: You all can scare them with that without us having to argue dollar amounts before this jury.

And I may just have to take a hardnosed attitude about this and just say that's the way we're going to do it, and we'll argue out this damage issue after we get the—

Mr. Baker: We are a long way from there now. We haven't put any evidence in. Why are we talking about what damages are going to come back?

Vol. 55, pp. 204-205

The Court: Now we are talking about a very fundamental thing, and that is, are we going to submit a damage issue to this jury or a percentage figure?

Mr. Baker: Your honor, why don't you give us a little time to see?

Vol. 55 p. 206

During the submissions and arguments about the instructions and verdict sheet for the jury this question was again briefed and discussed. Mead complains that the court overruled its motion for directed verdict based on the absence of dollar damage proof and that in denying that motion the court did not say that post-verdict proceedings would be permitted if the jury found for plaintiffs. The court is at a loss to understand what Mead thought that ruling meant if it did not realize it meant post-verdict proceedings. It virtually defies this court's experience in this case to conclude that Mr. Baker took part in these discussions, read the plaintiffs' proposed charge and verdict form, heard the court overrule Mead's motion for directed verdict, heard the court overrule Mead's objections to the proposed charge, and yet failed to realize that the computation of a dollar damage figure was being reserved for later proceedings should they be necessary.

As to the reasons for the decision, they were set out in Pretrial Order No. 60. As the Supreme Court of the United States stated in *Porter* v. *Warner Holding Co.*, "Since the public interest is involved in a proceeding of this nature, [the court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . the court may go

beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." 328 U.S. 395, 398-99.

The court has dealt with this motion for reconsideration at some length—not because it believes Mead entertains any serious questions as to the matters embraced herein, but because it knows that this case will be appealed and hopes to clarify the record. Specifically, Mead has asked three questions:

> "1. When did the Court formally reverse its denial of a bifurcated trial, putting Mead on notice that there would be *two trials before different juries* rather than a *unitary trial* on all issues *before the same jury*?
>
> 2. If there were a "clear understanding between counsel for both parties and the Court of the issue or issues involved in each phase what proof [was] required to pass from one phase to the next," [19] and why did plaintiffs attempt to introduce evidence of gross sales on July 28, 1980?
>
> 3. If there were an understanding between counsel and the Court that the trial would be bifurcated, why did the Court leave the record open for plaintiffs' introduction of net sales to class members?"

The answer to the first is that Mead was on notice at least from July 28, 1980, that the court contemplated bifurcating this part of the damage issue. The formal ruling was made when the court ruled on the jury instructions, overruling Mead's objection and stating "I know that you object to that. No sense in us arguing. I'm going to submit it this percentage way." Vol. 94, p. 145.

The answer to the second and third is that the court and *all* the parties considered various alternative methods of proof and submission on a great many issues in this lengthy and complicated trial. The record of the July 28 conference makes it clear at least to the court that plaintiffs preferred the percentage submission but wished to have some protection in the record if the court refused to submit the case on that basis. The court left the record open for introduction of new sales in the hope that stipulations would be reached which would obviate the need for any further proceedings.

Finally, Mead contends that its inexplicable ignorance of the existence of this open issue prejudiced it in that it did not call one of its expert witnesses to rebut the evidence plaintiffs did not offer. The only issue not submitted to the jury was the dollar value of corrugated materials sold to the class. In Mead's answers to interrogatories concerning this witness's subject matter it is stated that he will testify as to the same facts and opinions as he did in the companion criminal trial. Dollar amount of sales was not in issue in the criminal case. This interrogatory answer was never modified. Indeed, it is difficult to imagine what evidence Mr. Max could have given relevant to the dollar volume of sales and irrelevant to the rest of the damage issue. Further, although Mr. Max was present in the courtroom throughout the entire trial Mead made no motion to reopen its case to put him on the stand after the court ruled on the jury instructions and verdict sheet. To take this assertion at its face value, however, the court can find no prejudice to Mead in its failure to call Mr. Max.

DONE this 9th day of January, 1981 in Houston, Texas.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

(All Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER NO. 62

A conference having been held in this litigation on January 21, 1981, and numerous matters germane to the eventual entry of judgment in the class case having been briefed and discussed, the court issues the following order:

1. Mead's motion for permission to serve written interrogatories on all class members is DENIED. Although it is true that in some cases courts have permitted discovery of absent class members, this is an uncommon procedure and one to be used only where the discovery is necessary to the proceedings. *Brennan* v. *Midwestern Life Insurance Co.*, 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied sub nom. Herriman* v. *Midwestern Life Insurance Co.*, 405 U.S. 921 (1972). Mead's proposed interrogatory would be extremely burdensome to answer. "The usefulness of Rule 23 would end if class members could be subjected to Rule 33 and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories." *Wainwright* v. *Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972). The information sought can be more efficiently and accurately obtained from the superior records of the twenty entities who sold the corrugated products. It is true that this proposed interrogatory would have the effect of eliminating

from the claimants against Mead those class members who cannot be located or do not wish to file a claim. It would also, however, probably eliminate a large number of small purchasers who would be unable to answer these detailed interrogatories or unwilling to expend the time, effort, and legal fees necessary to do so.

Mead argues that proofs of claims will eventually be necessary. This may or may not be true. Under any circumstances, the most efficient and accurate method of obtaining the information Mead seeks is from the twenty entities whose business it is to sell the products in question rather than from some two hundred thousand entities which purchased corrugated but most of whose primary business was unrelated to corrugated.

The position of Mead, that a judgment entered on figures other than those supplied by absent class members constitutes "fluid recovery," is unsound. The class representatives have proved to the jury that all purchasers were damaged by an overcharge equal to 5 percent of their purchases. The class representatives now seek proof of the actual purchases through discovery of the sellers' records. No entity not covered by the jury's verdict will recover, nor will any entity be permitted to recover more than the jury found it to be injured, plus the statutory trebling of that figure. This scheme in no way permits the enlargement of any person's substantive rights under the Clayton Act through the use of Fed. R. Civ. P. 23. A similar objection was raised to that portion of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. §§ 15c-15h, which permits state attorneys general to sue civilly as *parens patriae* on behalf of their citizens for damages under the federal antitrust laws. In *In re Petroleum Products Antitrust Litigation*, 1978-1 Trade Cases ¶ 61,839 (C.D. Calif. 1978), Judge Gray overruled this objection in language equally pertinent to the case before this court:

> Recovery may be in no greater sum than [the citizens] could have obtained had they brought their own actions pursuant to section 4 of the Sherman Act (15 U.S.C. § 15). Of course, such recovery would involve treble damages, as provided in section 4, and "the trebling of damages in such cases is a statutory punitive measure." The penalty aspect of treble damages raises no present constitutional issue when the person injured is pursuing the action. To the extent that litigation under the Act is prosecuted for the benefit of the person injured and the recovery goes to such person, no greater constitutional problem could possibly arise.

¶ 61,839 at 73,496 (citations omitted).

The only question really at issue here is whether absent class members must prove their specific claims individually or whether the class representatives may do so for them, using normal discovery devices of the records of defendants. Although the court cannot find any discussion of this question in the case law, some commentators have advocated a proceeding which would significantly shorten or completely do away with the proof-of-claim proceeding. 3 NEWBERG ON CLASS ACTIONS § 4600 n. .02 (1977); A. MILLER, PROBLEMS IN ADMINISTERING JUDICIAL RELIEF IN CLASS ACTIONS UNDER FEDERAL RULE 23(b)(3), 54 F.R.D. 501, 506-509 (1972).

Additionally, there are several cases in which courts apparently have followed a similar procedure. The trial court judgment in *Boeing Co.* v. *Van Zemert* [sic], 100 S. Ct. 745 (1980), was entered in a sum determined by the fact finder to be the whole class's damages, which sum was placed in an escrow account. A master was appointed to locate class members, receive their proofs of claim, and rule on questions raised by their claims. *Boeing* at 680.

In *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974), the trial court had outlined a similar scheme for distribution of damages in its class certification order. The court of appeals reversed because the plan included a distribution of unclaimed funds to persons not found to be injured. The Second Circuit's opinion was vacated by the Supreme Court, which specifically left open the question of whether this type of "fluid recovery"—the distribution of unclaimed or unclaimable damages to some uninjured person with interests similar to those of the class—violated a defendant's due process rights. The Second Circuit did not, however, comment unfavorably on the plan to assess damages on a class-wide basis from defendants' records—only on distribution of portions of those damages to persons who were not determined to be injured parties under the Clayton Act.

In certifying classes of purchasers in the Eastern Sugar Litigation, *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976), Judge Cahn overruled objections based on the supposed unmanageability of class-wide damage proof and stated, "At this time it is the feeling of this Court that the most suitable procedure for the determination of damages sustained by the proposed consumer classes in this litigation, if any, is either by an aggregate class-wide approach or through individualized evidence based on proven and accepted statistical methods." 73 F.R.D. at 351. The court went on to state:

> In this litigation, defendants have maintained records and publicly have reported sales according to classes of purchasers. Consequently, it is possible to develop accurate statistical information of total sales to [the classes] . . . . Upon the establishment of such aggregate damages as may be assessed

> against defendants, the problems of allocations among classes and distribution within each class largely becomes a plaintiffs' problem . . . .

73 F.R.D. at 353.

The procedure utilized in *Boeing* and proposed in *Sugar* and *Eisen* (but without the "fluid recovery" aspects of *Eisen*) is very similar to the procedure this court is following. In these relatively uncharted waters, the court is attempting to steer a course which protects the rights of all parties, costs no more than is necessary, and produces as accurate and expeditious a result as can be found. For these reasons, Mead's motion for discovery of absent class members is denied.

2.a. Myron M. Sheinfeld, of the law firm Sheinfeld, Maley & Kay, Houston, Texas, is hereby appointed a master in this cause, as provided by Rule 53(b) of Civil Procedure, as of January 21, 1981.

b. The master shall report on the dollar value based on actual sales prices of corrugated containers and sheets sold by The Mead Corporation and the "settled respondents" * to class members as defined by this court's order of September 6, 1978, who have elected to remain in the class, for the period March 7, 1973, through December 31, 1975.

c. In formulating his report, the master should consider that the result can be approximate and inferential. *Cf. Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1945).

---

* "Settled respondents" shall mean those original defendants in the class cases (other than Crown Zellerbach) who have settled with the plaintiffs' class and who were not parties to the trial but were found by the jury to be members of the conspiracy alleged by the class. Alton Box Board, who settled during the trial, is also a "settled respondent."

d. Within forty-five (45) days of the entry of this order the master should rule on objections to the interrogatories served by plaintiffs on January 23, 1981. The master may call a hearing on this issue if he finds it necessary. Answers to the interrogatories should be returned to the master and filed with the court within a period after the master's order on the outstanding objections, which period shall be set by the master. In compelling answers to the interrogatories, the master should be guided by the following principles and examples, which are based on the major common objections to the interrogatories:

i. Where the pertinent data for 1973 is not readily available for March 7, 1973, through December 31, 1973, because summary records are maintained on a monthly or annual basis, estimates should be made by prorating the data that is available, so that annual figures are reduced in proportion to the ratio of the days from March 7 through December 31, 1973, to the total number of days in 1973, where only annual figures are available, or the ratio of the days March 7 to March 31, 1973, to the total number of days in March 1973, where only monthly figures are available.

ii. Items separately invoiced which are not part of the actual purchase price, such as separately invoiced charges for freight, printing dies, cutting dies, taxes, set-up charges, warehousing charges, or machinery charges, should be excluded by deducting the actual or estimated amounts of such charges.

iii. Portions of the sales price that were billed to customers but ultimately not paid by customers, such as returns and allowances, subsequent

cash or customer discounts, and bad debts, should be excluded by deducting the actual or estimated amounts of these items.

iv. Where it is impossible or impractical to segregate the sales to opt-outs, independent corrugators, or defendants and defendants' subsidiaries and affiliates from the sales to class members, exclusion of these sales may be accomplished by estimation based on a sampling of sales for less than the entire period.

v. Where estimation is used, the party answering the interrogatory should describe the procedures used to accomplish such estimation.

vi. Wherever possible, estimates should be expressed with a high and low range.

vii. All work papers used in answering the intergatories should be retained.

viii. Any entity required to answer an interrogatory should not respond by producing source documents in lieu of an answer.

e. The master shall schedule a hearing to commence within sixty (60) days of his receipt of answers to plaintiffs' interrogatories which were served on or about January 23, 1981. The master may continue and reconvene the hearing as he deems appropriate. At the hearing, a representative of each conspirator company shall be made available for examination by the master, class plaintiffs, and defendant Mead Corporation. The representatives of each company answering these interrogatories shall be prepared to testify at such hearing about all matters relating to their answers.

f. Mead and the "settled respondents" shall submit themselves and/or their agents for examination by the master as the master may direct. In connection with any such examination, the master may exercise all powers to which he is entitled under applicable law.

g. The master is hereby authorized to consult with the court, the court's staff, representatives of the court, employees and representatives of the plaintiff class, members of the plaintiff class, employees and representatives of defendant Mead Corporation, employees and representatives of "settled respondents," and any other party or entity as the master deems necessary.

h. The master is hereby endowed with all powers to which he is entitled under applicable law.

i. It is specifically contemplated by the court that the master shall have no responsibility to resolve disputes which may arise in connection with discovery costs incurred by any party, coconspirator, or other discovered entity.

j. As soon as possible after the hearing prescribed in paragraph e, above, the master shall circulate a preliminary report on the issues listed in paragraph b. Defendant Mead Corporation and class plaintiffs shall have ten (10) days from the date on which the preliminary report is filed to respond or otherwise object to the master's preliminary report. The master may schedule hearings on these objections as he deems appropriate.

k. The master shall file with the court a final report within ninety (90) days from the last hearing described in paragraph j.

l. All motions for summary judgment on the issue of the dollar amount of damages should be submitted to the court within fifteen (15) days of the date on which the master files his final report.

m. Any response to any motion for summary judgment must be filed with the court within fifteen (15) days of the date on which the relevant motion was filed.

n. After the master has filed his final report, the court may hold hearings as it deems appropriate to resolve all

matters not previously resolved by summary judgment. At any such hearing, the master's final report shall constitute *prima facie* evidence on all issues addressed by the court. In addition, at any such hearing held by the court, the parties' arguments and evidence shall be limited to the arguments and evidence presented to the master prior to the formulation of the master's final report.

o. The master is hereby authorized to employ, without prior court approval, paralegals, law clerks, legal assistants, accounting assistants, consultants, or other staff, as the master determines are necessary to aid him in the performance of his tasks. The compensation for such employees, assistants, and staff is hereby defined as part of the "expenses" incurred by the master.

p. Having considered several options in determining how to provide for the master's compensation and his expenses, the court hereby concludes that a fund be created in the amount of $250,000. This fund shall be established in accordance with separate order of the court. From the fund, the master is hereby authorized to make periodic withdrawals in order to pay his expenses and compensate him. Such withdrawals shall be effected through the presentation of an application and proposed order to the court. *See Gary W.* v. *State of Louisiana*, 601 F.2d 240 (5th Cir. 1979).

q. The fund referred to in paragraph 16 shall be replenished as the court may direct by separate order.

r. "Settled respondents" shall maintain records of their actual and reasonable expenses incurred in this discovery procedure.

3. The parties shall have until February 4, 1981, to respond to plaintiffs' application for appointment of a fee committee.

4. The motion of Container Corporation of America for clarification or reconsideration of its order disqualifying the firm of Chadwell, Kayser, Ruggles, McGee & Hastings from further representation of Container in the opt-out cases is DENIED. Container is hereby granted a further stay until February 20, 1981, of its obligations under the ongoing discovery program in those cases.

DONE at Houston, Texas, on the 27th day of January, 1981.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL HEARING—May 16, 1980

VOLUME I

* * * *

[60] THE COURT: Bifurcation of liability and damages, no.

MR. BAKER: What did you say on that, Judge?

THE COURT: No. I am not going to bifurcate.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

(All Class Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER 51

A pretrial conference having been held in this litigation on May 16, the court enters the following order:

1. Class plaintiffs' motion in limine regarding the admissibility of evidence of numerous witnesses' refusals to testify on fifth amendment grounds is GRANTED as to the following witnesses:

(a) Those who are present or former employees of Mead, Alton, Westvaco, or Crown-Zellerbach;

(b) Those who testified at the criminal trial.

The court will consider suggestions as to a format in which other witnesses who refused to testify at their depositions can be listed for the jury.

The court has given this question long and deep consideration and has studied the case law bearing on it. No reported cases have presented the serious dilemma posed here, where an unprecedented number of potential fact witnesses have refused to give evidence on what all the parties concede are somewhat attenuated fifth amendment grounds. The Court of Appeals for the Fifth Circuit has ruled that the immunity granted to these witnesses will not protect them if they repeat their testimony in this case; though the possibility that any of them might ever

be prosecuted is extremely remote, it remains a technical possibility. Their testimony, if it could be presented, could be useful to the jury. The court is faced with the problem of giving the jury evidence which is less than perfect or no evidence at all. It has therefore determined that some evidence explaining the absence of testimony from such a large percentage of those with knowledge to advance must be given to the jury and that the probative value of such evidence outweighs its possible prejudicial effect. This ruling has no bearing on the questions of what inferences may properly be drawn or on any other objections which may be raised as to individual questions and answers from the fifth amendment depositions or from the live testimony of witnesses at trial who claim the fifth amendment.

2. Plaintiffs' motion to exclude evidence of the financial condition of the parties is GRANTED as to plaintiffs. Rulings on the admissibility of evidence of defendants' financial condition will be made as the issue arises at trial.

3. Any evidence concerning class members' passing on of any overcharges shall be excluded from the trial and counsel shall not refer to pass-on in the presence of the jury without first securing the court's permission.

4. Plaintiffs' motion to unify the subclasses will be deferred until the close of evidence; the subclasses may each designate the same attorney to conduct examination of witnesses, etc., on their behalf.

5. Defendants are deemed to have made the following motions, which the court overrules:

(a) Motion to bifurcate the trial of liability and damages issues;

(b) Motion for a twelve person jury.

6. Plaintiffs' new motion to compel testimony of witnesses who have claimed the fifth amendment, on the grounds that their fear of prosecution is insubstantial, is DENIED.

7. Defendants' motion for partial summary judgment on the fraudulent concealment issue is DENIED. Fact issues remain as to what due diligence required and whether it would have disclosed grounds for suit by class members.

8. The motion of Southwest Forest Industries, Inc., to sever for trial the claims of class plaintiffs against it and for a stay of that severed trial is GRANTED.

9. The parties shall provide to each other all opinions, reports, and underlying data of their expert witnesses by May 27, 1980.

10. Plaintiffs shall by May 21, 1980, designate those portions of depositions which they propose to introduce at trial. Defendants shall counter-designate additional portions by May 23.

11. Another conference will be held at 10:00 a.m., Thursday, May 22 to discuss matters still outstanding in relation to the trial, which will begin May 27.

DONE this 23rd day of May, 1980 in Houston, Texas.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

VOLUME 1

June 9, 1980

(Morning Session)

* * * *

[37] THE COURT: This alleged conspiracy, plaintiffs claim, was an agreement to fix, raise, maintain, or stabilize the prices of corrugated materials by agreeing not to compete on the basis of price through agreeing to exchange price information and to honor that exchange price information.

Under the antitrust laws of the United States, it is illegal to conspire to fix the prices of products. Plaintiffs claim that the alleged conspiracy resulted in their paying higher prices than they would otherwise have done and they are suing to recover the alleged overcharge.

The defendants deny that there was a conspiracy. They further deny that they participated in such a conspiracy, if there was one. They further deny that plaintiffs were injured and that they are entitled to any damages.

The period the plaintiffs claim the [38] conspiracy lasted was from at least 1960 through 1975.

A conspiracy is an agreement or understanding between two or more persons. The gist of the violation is an agreement or understanding of two or more persons to violate or disregard the law. Mere similarity of conduct among various persons and the fact they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. It is not necessary that the evidence show that the members of a conspiracy entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated at a specific time and place precisely what their objective was or the details or means by which it was to be achieved.

However, it is necessary that the evidence show that an agreement did exist; in other words, the members of the conspiracy in some way or other came to a mutual agreement or understanding, the purpose or effect of which was to fix, raise, maintain or stabilize prices.

[39] You should pay attention to the evidence concerning each defendant and absent manufacturers of corrugated. If you find that there was an unlawful conspiracy or understanding, then you will be asked to determine which, if any, of the defendants and absent manufacturers of corrugated were participants.

All of the defendants are corporations. A corporation can act only through its agents or employees and, therefore, a corporation is legally responsible for the unlawful acts of its officers, employees, or other agents so long as the unlawful acts are done within the scope of the employment. If done within the scope of his employment, the act of an employee is legally the act of the corporation.

Under the laws of this country, one or more persons can bring a suit on behalf of a class of persons who have similar claims. This enables the parties and the courts to try a case once and settle the issues for all concerned

rather than having to try it a number of different times, with different [40] Judges and juries having to hear the same evidence and decide the same questions.

The plaintiffs in this case are suing both for themselves and for approximately 200,000 other companies who buy boxes or sheets from those manufacturers of corrugated who they claim participated in a conspiracy.

I am going to give you some background on the case you will hear in order to make the presentation of evidence more understandable. I want to emphasize again that what I say here is not evidence and that it is not to be considered by you in reaching your verdict.

About 1975, the United States Department of Justice began an investigation into possible violations of the antitrust laws in the corrugated industry. That investigation eventually led to the indictment by a grand jury of some corrugated manufacturers. Some of those indicted pled no contest; some went to trial, and all who went to trial were acquitted by the jury. That means they were found not guilty.

* * * *

[45] The plaintiffs have the burden of proving each essential element of their case by a preponderance of credible evidence. As used in these instructions, a preponderance of credible evidence means the greater weight and degree of credible evidence before you. To establish by a preponderance of the evidence means to prove that something is more likely so than not so.

In other words, a preponderance of evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds belief that was is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless

otherwise instructed, [46] consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

* * * *

[58] You, the jury, will consider and weigh the evidence presented in order to decide whether the defendants are liable to the plaintiffs for any damages. In making [59] this decision, you will weigh and consider all of the evidence in the case, the documents and the testimony of all the witnesses, and determine under the instructions given to you by the court whether or not the plaintiffs have proved by a preponderance of the credible evidence that the alleged conspiracy existed and that a defendant has participated in that conspiracy and that such participation damaged the plaintiffs.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

July 22, 1980

VOLUME 49

(Morning Session)

* * * *

[105] Q [By Plaintiffs' Counsel Mr. Susman]: All right. Mr. Beyer, could you now explain just what that chart represents?

A: It represents the—what the prices would have been, [106] shown here by the dotted line, the difference between them, had there been no collusion, no collusive activities during this period.

This represents an average of 7.8 per cent. Begins with a transition point at the end of 1977, working back.

So during this period of time during 1976, in fact, that percentage difference is smaller. There was some impact and some injury even after 1975, because of the lingering effects of the collusive activities, but on the average—prior to 1975, 1976, the average is 7.8 per cent.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

July 22, 1980

VOLUME 50

(Afternoon Session)

* * * *

[222] Q [By Defendant's Counsel Mr. Raines]: All right. You have not attempted to identify which of any of these 220,000 purchasers was charged any particular price? You cannot make your testimony specific as to this jury as to whether any of the people that have testified, Gerber, whether or not prices with regard to them were 7.8 percent higher or lower?

You have not attempted to analyze that on a specific basis?

A We have not looked at each and every purchaser. We have taken the information that is available to us, looked at this in terms of the national averages that we—and the data that were available; looked at it in terms of its geographical impact and arrived at a conclusion, which were described, and for reasons, I think, that are set out fairly clearly both this morning and earlier this afternoon, that as a result of the analysis we did, that we could expect that all purchasers were injured. Some may have been injured more than others.

I am not saying that every purchaser was affected exactly the same way, but that all purchasers were injured.

And it is both neither feasible to go [223] through 220,000 purchasers because we would have to do exactly the same kind of analysis, nor would it be necessary in order to arrive at a reasonable conclusion.

Q And it wasn't done?

A No. It wouldn't have been feasible to have done that and, as I just mentioned, it would not have been necessary in order to arrive at a reasonable conclusion that all purchasers were injured as a result of this collusive behavior.

Q And it wasn't done? I mean, the question, I assume, is simply it was or it wasn't done.

My question is, it wasn't done?

A No. And I have given you the reasons why.

Q I understand that. Now, you have a bottom line estimate of 7.8 and a top estimate of 19.1. Is that correct?

A No. The 19.1 is not a top estimate. The 19.1 represents what was the general overcharge, and it is possible, it is very probable, that there were purchasers who were injured by more than that.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

July 28, 1980

VOLUME 55

(Afternoon Session)

* * * *

[188] How about the answers to the interrogatories?

MR. RUYAK: Your Honor, we have an objection to those. Plaintiffs seek to admit answers to interrogatories on gross sales of a number of defendant corporations, which include intracorporate sales for those companies and sales between defendants.

It is our understanding that this case involves if any sales, sales to other than those two sources and they are not broken down in the answers to interrogatories.

If the plaintiffs are going to use those figures, Your Honor, they are [189] incorrect for anything because they include intracorporate and sales to other defendants.

MR. SUSMAN: Your Honor, these are the interrogatories that we sent out. These were the answers to the interrogatories on damages.

We request permission to put them in evidence. We do not intend to make any use of them.

We have never gotten around, unfortunately, to discussing with the court the charge in this case. We have suggested to the court that a special verdict go to the

jury to find a percentage overcharge and to find who participated in the conspiracy.

And if that is the way the court is going to submit the case, which is what we recommend, it is unnecessary to put any of this in because, subsequent to the conclusion of the trial—

THE COURT: I had thought that it would be—without you even bringing it up—that that is the way I would * * *

* * * *

[212] fact what is the damage dollar impact here.

THE COURT: But, we can't do it if you don't get these gross sales here.

MR. BAKER: That's what I'm saying. Let us work on that.

MR. BLACK: You'll have to be a little flexible with us in terms of demanding that we close our case immediately if we are going to work on that.

MR. BAKER: Maybe your case can be closed subject only to.

THE COURT: That's fine.

MR. BLACK: Sure, something like that.

THE COURT: Let's close it subject to you doing something.

MR. ARPS: I want to be dead sure that it's subject to that single item, because you keep opening the door and opening the door.

THE COURT: I am not going to let them reopen this case.

MR. BLACK: We don't want to.

* * * *

LETTER OF HAROLD F. BAKER

HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

HAROLD F. BAKER
(202) 383-7039

September 6, 1980

Honorable John V. Singleton, Jr.
United States District Court
Southern District of Texas
515 Rusk Avenue
Houston, Texas 77002

Re: Corrugated Container Antitrust Litigation
MDL No. 310

Dear Judge Singleton:

This is in reply to Plaintiffs' Memorandum In Support of Their Proposed Special Verdict Form. In addition to this quick letter reply, we would like to be heard on this issue because it is of paramount importance.

The reference to the *Plywood Cases* is totally inapposite for the following reasons, among others:

(1) In *Plywood* the principal question involved was the utilization of "West Coast Freight," *i.e.*, a standard ascertainable charge from Portland, Oregon, to the destination of each plywood delivery. There was no question as to the amount; it was simply a matter of looking at the freight rate book. Hence, the damage calculation was uniform and consistent, once the initial question of liability as to the use of "West Coast Freight" with respect to each and every shipment was decided adversely to defendants.

(2) In this case, as the Court knows, there was no such uniform damage principle that automatically follows a finding of liability. Plaintiffs themselves have come up with various percentages and ranges of percentages and Mr. Beyer himself testified categorically that the amount of damage with respect to individual purchasers was variable.

(3) The evidence shows vast segments of the market (both geographic and product) which, under no stretch of the imagination, could fit into the application of a standardized uniform overcharge percentage. That is totally different from the *Plywood Cases*. In this connection plaintiffs' proof through Mr. Beyer and otherwise deals only with claimed average overcharges in broad and speculative ranges and does not even purport to deal with uniform overcharges by either class of product, *e.g.*, commodity boxes vs. high-value-added boxes, fresh fruit and vegetable boxes vs. beef breaker boxes, etc., nor do plaintiffs or Beyer purport to deal with damage factors on the basis of varying geographic markets which have been the subject of varying quantum and quality of proof. For example, the proof as to the Denver, Kansas City or St. Joe market is not comparable with the proof with respect to proof in other markets.

(4) The exact same observations are true with respect to the "standard weights" involved in the *Plywood Cases*. These were mathematically precise, assumed weights for carloads of plywood, irrespective of actual weights. Hence, if the standard weights were declared to be an illegal part of the conspiracy, the application of damages simply required a calculation as between actual weights of each carload and the standard weight used in pricing.

(5) Once the question of liability was decided in *Plywood* on the basis of "West Coast Freight" and "standard weights," no issue of damage fact remained but only questions of calculation. That is totally untrue in the

instant case. Both the fact of and the amount of damage are in dispute factually, and there is no liability finding that the jury can be asked to make that circumvents findings of impact and the damage with respect to specific markets, both geographic and product, even assuming over defendant's objections that plaintiffs are allowed to seek from the jury multiple verdicts based on multiple sections of the country, contrary to the allegations of the complaint and the theory upon which it has been tried.

(6) The Court in this case specifically declined to grant a bifurcated trial and ordered that the issues of liability and damages would be tried together. To now change that ruling, as plaintiffs suggest, and have the Court determine disputed issues of fact as to impact and damages in the event liability is found would be unfair, constitute a denial of due process and a denial of trial by jury.

Respectfully submitted,

/s/ Harold F. Baker
HAROLD F. BAKER

cc: Counsel for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 8, 1980

VOLUME 94

(Afternoon Session)

* * * *

[145] MR. BAKER: Down in the next paragraph, "you are asked to find the amount of the overcharge, if any, in terms of percentage." I want in terms of a dollar overcharge.

THE COURT: Oh, I know that. I know that you object to that. No sense in us arguing. I'm going to submit it this percentage way.

MR. BAKER: Well, how are you ever going to come up with damages?

THE LAW CLERK: Multiply it by sales during whichever period they find from whichever suppliers they find were members of the conspiracy.

MR. SUSMAN: Or claims.

MR. BLACK: Or claims.

MR. MONTAGUE: Apply that to the claims.

[146] MR. BAKER: Well, let me continue and I'll come back to that. I think it's wrong and we take exception to it.

THE COURT: I know you do.

MR. BAKER: And I think—

THE COURT: I don't see how I can submit it any other way.

MR. BAKER: Well, I can suggest how you can submit it.

THE COURT: How? There is no dollar figure here for them to find.

MR. BAKER: They have claims that were made here by the class members against the settlement funds and they know exactly what those claims are.

MR. BLACK: But the people who didn't file claim forms aren't precluded from filing—

THE COURT: That is not in evidence here.

MR. BAKER: It is their burden of proof.

THE COURT: I understand your point is that if they have failed to prove damages, that's just too bad, [147] they failed.

MR BAKER: You bet your life.

THE COURT: But I'm stuck with a charge on what has been put into evidence in this case, and if the plaintiffs—

MR. BAKER: Well, then, I'm entitled to a directed verdict right now.

THE COURT: I understand your point.

MR. BLACK: Can I reserve my one—my one—

THE COURT: I understand exactly.

MR. BAKER: I haven't even used my full allotted time, your honor.

THE COURT: Yes, you have.

MR. BAKER: No, I haven't.

THE COURT: Let's not argue about that because I'm stuck with it, right or wrong, it looks like to me.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

* * * *

TRANSCRIPT OF PROCEEDINGS

September 9, 1980

VOLUME 95

(Morning Session)

* * * *

[63] THE COURT: Just put the numbers in.

Diane, they offered them in evidence, I sustained the objection to them on the basis that they are not relevant to any issue before the jury.

MR. COHEN: And that's Exhibits 4929 [64] through—

THE COURT: I assume your objection includes an objection on relevancy?

MR. RUYAK: Yes. Simply stated, because they do not show the sales that the class would have had. They include intracorporate sales, they include sales to opt-outs, and they include sales to other defendants, and therefore they are not accurate dollar sales to the class by year.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 9, 1980

VOLUME 96

(Afternoon Session)

* * * *

[292] MR. BAKER: I've got a motion.
THE COURT: And you want a motion for judgment?
MR. BAKER: Yes.
THE COURT: I overrule that.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 11, 1980

VOLUME 100

(Morning Session)

* * * *

[14] THE COURT: Mr. Baker, you filed a motion, directed verdict, concerning the sheet plant.

MR. BAKER: We also want to file a motion to decertify the class, and I hereby file such a motion.

THE COURT: Okay. Just take it that you filed the motion to decertify the class and I overruled it.

File your motion for directed verdict, [15] which I have studied and overruled.

MR. BAKER: All right. Do we file a separate motion for directed verdict on the sheet plant class?

MR. RUYAK: Yes.

MR. BAKER: I just want the record to show it's also on the sheet plant.

THE COURT: That's correct. That's the one you just handed me about 30 minutes ago.

* * * *

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL CLASS ACTIONS

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. Was there a combination or conspiracy (as defined in the Instructions) involving two or more corrugated producers to fix, raise, maintain, or stabilize or to otherwise affect prices of corrugated materials by agreeing not to compete on the basis of price or agreeing to exchange price information, which agreement had the purpose of affecting, or did in fact affect, prices paid for containers and sheets sold throughout the United States.

Yes

(Yes or No)

(If your answer to Question 1 is No, your verdict is for defendant and you should answer no further questions.)

2. If your answer to Question 1 is yes, was the Mead Corporation a member of the combination or conspiracy?

Yes

(Yes or No)

(If your answer to Question 2 is No, your verdict is for the defendant and you should answer no further questions.)

3. If your answer to Questions 1 and 2 is yes, were any of the following companies also members of the combination or conspiracy?

Alton Box Board Co.	Yes
	(Yes or No)
Boise Cascade Corp.	Yes
	(Yes or No)
The Chesapeake Corporation of Virginia	No
	(Yes or No)
Consolidated Packaging Corporation	Yes
	(Yes or No)
Container Corporation of America	Yes
	(Yes or No)
The Continental Group, Inc.	Yes
	(Yes or No)
Corco, Inc.	No
	(Yes or No)
Crown Zellerbach Corporation	Yes
	(Yes or No)

Diamond International Corporation	No
	(Yes or No)
Dura-Containers, Inc.	No
	(Yes or No)
Fibreboard Corporation	No
	(Yes or No)
Georgia-Pacific Corporation	No
	(Yes or No)
Green Bay Packaging, Inc.	No
	(Yes or No)
Hoerner Waldorf Corporation (Champion International Corporation)	Yes
	(Yes or No)
Inland Container Corporation	Yes
	(Yes or No)
International Paper Company	Yes
	(Yes or No)
Interstate Container Corporation	Yes
	(Yes or No)
Longview Fibre Company	No
	(Yes or No)
MacMillan Bloedel Companies	Yes
	(Yes or No)

Menasha Corporation	No
	(Yes or No)
Olinkraft, Inc.	Yes
	(Yes or No)
Owens-Illinois, Inc.	Yes
	(Yes or No)
Packaging Corporation of America	Yes
	(Yes or No)
Potlatch Corporation	No
	(Yes or No)
St. Joe Paper Company	Yes
	(Yes or No)
St. Regis Paper Company	Yes
	(Yes or No)
Southwest Forest Industries, Inc.	Yes
	(Yes or No)
Stone Container Corporation	Yes
	(Yes or No)
Union Camp Corporation	No
	(Yes or No)
U.S. Corrugated Fibrebox Company	No
	(Yes or No)

Western Kraft East, Inc.	No
	(Yes or No)
Weyerhaeuser Company	Yes
	(Yes or No)
Willamette Industries, Inc.	No
	(Yes or No)

4(a) If there was a combination or conspiracy, did it begin before January 1, 1964 and continue at least until December 31, 1975?

Yes

(Yes or No)

If the answer above is No, specify during what period the combination or conspiracy existed. _____

(Specify)

(b) Did Mead or any other participant company withdraw from the combination or conspiracy prior to December 31, 1975?

Yes

(Yes or No)

If so, indicate which company and on what date.

Defendant or Other Company	*Date*
Crown	January 1970

(Use a separate sheet if more room is necessary.)

5. If in your response to Question number 3 you found that the combination or conspiracy began prior to March 7, 1973, answer the following:

(a) Did the participants conceal the combination or conspiracy through affirmative acts of concealment?

No

(Yes or No)

(b) Did sheet plant plaintiffs exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy? No

(Yes or No)

(c) Did plaintiffs other than sheet plant purchasers exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy? No

(Yes or No)

(d) If the sheet plant purchasers of corrugated containers and sheets had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence. Yes

(Yes or No)

(e) If the purchasers of corrugated containers and sheets other than sheet plants had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence. No

(Yes or No)

6(a) If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to the sheet plants in their purchases of corrugated containers and sheets throughout the United States? Yes

(Yes or No)

(b) If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to

purchasers other than sheet plants in their purchases of corrugated containers and sheets throughout the United States? Yes

(Yes or No)

7(a) If your answer to Question 6(a) is Yes, state by what percentage of the purchase price sheet plants were damaged. 5%

(Fill in percentage figure)

(b) If your answer to Question 6(b) is Yes, state by what percentage purchasers other than sheet plants were damaged. 5%

(Fill in percentage figure)

September 13, 1980

/s/ Carolyn R. Keyes
CAROLYN R. KEYES

Foreperson

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 13, 1980

VOLUME 102

* * * *

[48] MR. BAKER: My view is that the court has no power, authority or jurisdiction to do anything but discharge the jury and enter a judgment in accordance with the verdict.

THE COURT: Okay. Fine.

MR. SUSMAN: That's fine. I don't see there's anything we can do.

THE COURT: All right. Anything else?

MR. BAKER: Could we have permission to talk to the jurors?

THE COURT: Yes. If you'll wait around, I'll let you talk to them, if you want to.

Okay. I am first going to go back there and thank them for myself, and then I'll bring them in here and let you talk to them, if you want to, Mr. Baker, any of you. I'm going to tell them.

Okay.

[49] MR. SUSMAN: Thank you.

(Court excused the jurors at 3:55 p.m.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

This Document Relates To All Class Action Cases And To Post-Verdict Special Master

---

NOTICE OF MASTER'S HEARING

TO: Stephen D. Susman, Esq., Chairman, Plaintiffs' Steering Committee, Susman & McGowan, 806 Main Street, 21st Floor, Houston Texas 77002

Harold F. Baker, Esq., Counsel for Mead Corporation, Howrey & Simon, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006

John D. Roady, Esq., Counsel for Settled Respondents, Hutcheson & Grundy, 3300 Two Allen Center, Houston, Texas 77002

Please take notice that the Master's Hearing in connection with Plaintiffs' Interrogatories to Mead Corporation and Settled Respondents Concerning Sales to Class Members will be held in Houston, Texas at 10 o'clock a.m. on April 8, 1981, in Judge Hannay's Courtroom No. 4, Ninth Floor, United States Court House, 515 Rusk Avenue.

Any objections to such interrogatories, if not already filed, are to be filed with the Court and the Master by April 3, 1981, and served upon the Chairman of Plaintiffs' Steering Committee and counsel for Mead Corporation so as to be received by them on or before April 3, 1981.

Dated: March 24, 1981

MYRON M. SHEINFELD, Special Master
Sheinfeld, Maley & Kay
2130 Two Shell Plaza
Houston, Texas 77002
(713) 224-3640